No. 91-1382

In The

Supreme Court of the United States

October Term, 1991

THE SHUBERT ORGANIZATION, INC., et al.,

Petitioners,

v.

LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court, Appellate Division, First Judicial Department of the State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the accompanying amicus curiae brief in support of the Shubert Organization and the other petitioners pursuant to Supreme Court Rule No. 37 urging this Court to grant the petition for certiorari.

Written consent to the filing of this brief has been granted by counsel for petitioners and counsel for

respondents expressed in writing no objections. Consent has been withheld by counsel for intervenor-respondent Save the Theatres, Inc., requiring the filing of this motion. Copies of these consent letters have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in the litigation of matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The New York Supreme Court, Appellate Division, ruled that the Landmark Law of the City of New York was previously adjudicated as valid by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). As a consequence the New York court held as a matter of law that no taking of private property without the payment of just compensation resulted from the landmarking of the theatres on Broadway and the prohibition of their demolition or alteration. However, by the direct application of *Penn Central* in this manner, the lower court refused to adhere to the admonitions of this Court in that case regarding the need for an *ad hoc* judicial evidentiary hearing. PLF believes that this serious

misapplication of *Penn Central* sets the stage for wholesale intrusions on the fundamental right to reasonable use of private property.

Attorneys for PLF have participated in numerous land use takings cases before this Court and other courts as *amicus* and in representing property owners. PLF participated as amicus in *Penn Central* and PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1]

Amicus firmly believes that a review of this matter is necessary in order that the constitutional issues involved may be properly considered. The decision below conflicts with the precedents of this Court, including *Penn Central*, and other federal authorities holding that even a valid

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[1] PLF has also participated as *amicus* in other "takings" cases before this Court such as in *Yee v. City of Escondido*, No. 90-1947 (Apr. 1, 1992); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *Lucas v. South Carolina Coastal Council*, No. 91-453 (Jan. 1992); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 447 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981); *Federal Communications Commission v. Florida Power Corporation*, 480 U.S. 245 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987).

regulation that deprives a landowner of economical viable use of property or frustrates reasonable investment-backed expectations will result in an unconstitutional taking of private property if just compensation is not paid. To insure that the overriding purpose of the Takings Clause is met, *i.e.*, to bar government from forcing selected property owners alone to bear public burdens which should be borne by the public as a whole, it becomes essential for the state courts to afford property owners, as a minimum, an *ad hoc* judicial inquiry regarding the particular circumstances of each case. This includes analysis of the economic impact of the regulation on the property, the extent of interference with distinct investment-backed expectations, as well as the character of the governmental action and any other relevant factors. *Penn Central*, 438 U.S. at 124.

For the foregoing reasons, Pacific Legal Foundation requests that the motion to file the annexed brief amicus curiae be granted.

DATED: April 27, 1992.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of amicus Pacific Legal Foundation (PLF) is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

In 1982, the Helen Hayes and Morosco Theatres were razed to accommodate a city-promoted effort to revitalize Time Square. This included building a major new hotel at

Broadway and 45th Street (now the Marriott-Marquis Hotel) which incorporated the construction of new legitimate theatres. The ensuing outpouring of public concern over the loss of these two theatres led to a complete reversal in city policy from replacement to preservation of existing Broadway theatres.

Between October, 1987, and January, 1988, the city's Landmarks Preservation Commission (Commission) issued landmark designations for 28 theatres (some were landmarked as to interior as well as exterior) of which 22 are owned by the petitioners and are the subject of this action. In addition, regulations of the New York City Board of Estimate prohibit the demolition of these theatres without a Special Demolition Permit obtainable only on a showing that the theatre is unsafe for continued use, or with findings by the City Planning Commission "[t]hat demolition of the theatre structure will not unduly diminish the character of the Theatre District as a cultural, entertainment and theatrical showcase." Zoning Resolution 81-742.

Petitioners timely filed for judicial review of the landmark designations.[1] The trial court refused to conduct an evidentiary hearing regarding the economic impact of these designations and also dismissed petitioners' takings damage claims without an evidentiary hearing. Based on Justice Brennan's statement in *Penn*

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[1] The property owner in *Penn Central* had opposed the landmark designation before the Commission, but did not seek judicial review of the final designation decision. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 116 (1978).

Central Transportation Company v. City of New York, 438 U.S. 104, to the effect that "a city *may*, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on development of individual landmarks . . . without effecting a 'taking,' " *id.* at 107 (emphasis added), the trial court concluded as a matter of law that a landmark designation cannot result in a taking.

On appeal, the Supreme Court, Appellate Division, similarly concluded that "[s]ince the [United States] Supreme Court in *Penn Central* . . . clearly ruled that the application of the Landmarks Law does not affect a taking of the property, the constitutional challenge thereby is resolved." *Shubert Organization, Inc. v. Landmarks Preservation Commission of the City of New York*, 570 N.Y.S.2d 504, 508 (1991).

Even assuming that the Landmark Law as applied to these theatres does substantially advance a legitimate governmental interest (and does not exist solely for the preservation of the economic interest of the industry or the city) it does not follow that this is the end of the required inquiry. Still to be adduced are questions of whether there has been a violation of the Fifth and Fourteenth Amendments requiring the payment of just compensation for the use of private property for public purposes, and whether the burdens of societal obligations or benefits have been unfairly placed on a select group of property owners.

Amicus respectfully submits that the ruling of the New York court in this matter is not only contrary to the law of takings jurisprudence that has been developed by

this Court, but it is also irreconcilable with the majority opinion in *Penn Central* on which it relies.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that regulatory acts of government violate the Takings Clause of the Fifth Amendment if the action fails to substantially advance legitimate governmental interests, denies economic use of one's property, *or* frustrates reasonable investment-backed expectations. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). The function of these indicia is to reveal whether a select group of property owners is being unfairly required to bear societal and general welfare burdens with little or no private benefit. *Yee v. City of Escondido*, No. 90-1947, slip op. at 1 (Apr. 1, 1992); *Nollan*, 483 U.S. at 825 n.4; *Penn Central*, 483 U.S. 104 at 147-49 (Rehnquist, J., dissenting).

The ordered preservation of these private structures, because their continued use as theatres is beneficial to New York City and society generally, and not to prevent some noxious use, clearly results in a taking of private property. The city has not only acquired a servitude in the land for public use comparable to the "navigational servitude" in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), but has also placed on the owners an affirmative duty to maintain the structures in their current condition for the benefit of the public.

More importantly, the majority opinion in *Penn Central*, relied on by the city, acknowledges that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. As a result it is imperative that the trial court engage in "these essentially ad hoc, factual inquiries" to ascertain the economic impact of the regulation on the claimant as well as the character of the governmental action. *Id.*

REASONS FOR GRANTING CERTIORARI

I

THE FIFTH AMENDMENT BARS GOVERNMENT FROM FORCING SOME PEOPLE ALONE TO BEAR PUBLIC BURDENS WHICH IN FAIRNESS SHOULD BE BORNE BY THE PUBLIC

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As the now Chief Justice correctly noted in *Penn Central*, the New York City Preservation Law places the entire economic burden on the owner of the designated property with none of the reciprocal benefits that flow from zoning restrictions:

> Here, however, a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed. The Fifth Amendment
>
> > "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public a full and just equivalent shall be returned to him." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

Penn Central, 438 U.S. at 147-48 (Rehnquist, J. dissenting). The theatre owners are penalized, not for any "noxious" use of their property, but precisely because they did "*too good* a job" in designing, building, and maintaining these structures and must now preserve and maintain them unchanged for the benefit of sightseers and tourists. *Id.* at 146 (emphasis in original; Rehnquist, J., dissenting).

As Justice Brennan observed in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981):[2]

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[2] While Justice Brennan's opinion was a dissent, the now Chief Justice made it clear in his concurring opinion that except for

(Continued on following page)

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property . . . . From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

Id. at 652 (footnote omitted).

Clearly, the imposition of landmark designations coupled with the inability to modify the structures or otherwise convert the properties to other legitimate uses that are enjoyed by adjoining properties results in a Fifth Amendment taking without payment of just compensation. The fact that these theatre owners have no plans to demolish or convert to other uses has no bearing either upon ripeness nor the fact that a servitude has been placed on their properties that reduces their fair market value.

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the "final judgment" issue he "would have little difficulty in agreeing with much of what is said in the dissenting opinion," which would have otherwise placed this as the majority opinion. *Id.* at 633.

II

GOVERNMENTAL ACTION RESULTING IN A REGULATORY RESTRICTION ON THE USE AND ENJOYMENT OF PRIVATE PROPERTY REQUIRES A JUDICIAL CASE-BY-CASE FACTUAL ANALYSIS

The Appellate Division below relies on the fact that the theatre owners can still receive the economic benefit of continued use of the buildings as theatres and make use of transferable development rights (TDRs). This same issue was raised in *Penn Central* as to whether TDRs constituted just compensation, but was not addressed. In that case, however, the owners were invited to submit additional evidence on the issue and "[a]ppellants chose not to avail themselves of this opportunity." *Penn Central*, 438 U.S. at 122. In contrast, the theatre owners here were denied all opportunity to present factual evidence at a judicial hearing.

The fact that owners may have some residual usage or "can still walk on, or ride a bike on, or look at their land does not, at this preliminary stage of the case, reassure us [that a taking has not occurred]." *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990). As further stated by the court in *Lockary*:

> However, the determination of what constitutes an economically viable use of land requires a case-by-case factual analysis of the particular circumstances presented. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Resolution by plenary hearing rather than by summary judgment is particularly important for claims of regulatory taking. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 177 (4th Cir. 1988).

Lockary, 917 F.2d at 1155.

Even assuming that the application of the Preservation Law to the theatres in question substantially advances a legitimate governmental interest, that does not end the inquiry as the New York courts below erroneously concluded. As stated recently by the Ninth Circuit in another recent case, *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991):

> The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the [owners'] property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. These things typically cannot be assessed properly without a factual record.

McDougal, 942 F.2d at 680. *See also Kaiser Aetna v. United States*, 444 U.S. at 174-75; and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). "There is no set formula to determine where regulation ends and taking begins." *Id.* at 594.

More recently Justice O'Connor writing for the majority of this Court in *Yee v. City of Escondido* and relying on *Penn Central* stated that a regulatory takings case "necessarily entails complex factual assessments of the purposes and economic effects of government actions." Slip op. at 1. It is difficult to envision how complex factual issues can be disposed of as a matter of law or by summary judgment as has occurred in this case.

For the proper resolution of this matter, concepts of due process require that a judicial trial be conducted

examining the economic impact of the landmarking of the sites, the nature of the governmental action, and a determination as to whether TDR rights and other benefits, if any, constitute just compensation.

CONCLUSION

The Takings Clause of the Fifth Amendment as incorporated into the Fourteenth exists to shield the owners of private property against government regulation that "goes too far." As observed by Justice Holmes in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922): "When this seemingly absolute protection [of the Takings Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 415.

Today, the temptations of government for "off budget" financing of social demands and concerns have made Justice Holmes' observation even more critical. Now government seeks to provide societal solutions through the regulatory process by placing the costs on select owners of property, and thereby avoid the politically sensitive issues of funding, taxation, budgeting, and prioritizing expenditures for new social programs. In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the city proposed to require landlords to bear the costs of subsidizing increased rents of hardship tenants, which is normally a function of government. Justice Scalia appropriately observed:

> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.

Id. at 22 (Scalia, J., concurring in part and dissenting in part).

Without the intervention of this Court, it is inevitable that government will, with increasing frequency, continue to misuse its regulatory authority to shift the political demands of social, economic, and cultural improvements onto the backs of selected property owners who are in no way responsible for the social condition to be remedied. To the contrary, the good design, construction, maintenance, and continued use of these theatres by their owners has led to the landmark designation and the consequential loss of economic viable use and substantial interference with reasonable investment-backed expectations.

Here the city ostensibly wants to preserve the historical and cultural heritage of the old Broadway theatres in New York. The purpose may be legitimate, but that does not conclude the takings analysis that these owners are entitled to under *Penn Central* and the many other cases examined by this Court. The owners are to be afforded a judicial evidentiary hearing as to the economic impact of the landmark designations on each of the properties, the nature of the governmental action, and whether TDR rights and any other benefits constitute just compensation.

For the reasons stated above and in the petition for certiorari amicus, Pacific Legal Foundation, urges this Court to issue a writ of certiorari to review the judgment and opinion of the New York Supreme Court, Appellate Division.

DATED: April, 1992.

Respectively submitted,

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